

**SUBJECT: Broadening the United States' Jurisdiction Under the
Espionage Laws**

Section 791 of title 18, United States Code, is entitled "Scope of Chapter" and reads as follows:

"This chapter shall apply within the admiralty and maritime jurisdiction of the United States and on the high seas, as well as within the United States."

Because this section has been considered as a limitation on the jurisdiction of the United States prohibiting prosecution of espionage offenses which have occurred in foreign countries, the Department of Justice has submitted to Congress a proposal to broaden the jurisdiction by eliminating all of section 791. A bill to this effect (H. R. 1992) has passed the House and is now pending in the Internal Security Subcommittee.

Should H. R. 1992 pass the Senate and become law, two arguments support the contention that the Government then would have jurisdiction to prosecute violations of the espionage laws occurring in foreign countries: (1) The Bowman case theory and (2) the legislative history of the repeal of section 791 shows that the intent of Congress was that the United States is to have power to prosecute United States citizens who have committed acts of espionage against the United States no matter where the acts occurred.

The case for repealing section 791 of title 18, United States Code, as the method of expanding the jurisdiction of the courts in punishing acts of espionage committed against the United States in foreign countries depends upon the decision in the case of United States v. Bowman (260 US 94). Certain language in that case is useful as an argument for eliminating any mention of jurisdiction in the espionage law. It is suggested, however, that the Bowman case may be successfully circumvented and, should the bill repealing section 791 be enacted, a prosecution for an act of espionage committed abroad may still be unsuccessful on jurisdictional grounds. It is recommended, therefore, that to accomplish the objective sought, i. e., the expansion of jurisdiction, it would be preferable if not essential to amend section 791 by adding the words "and elsewhere" to the present 791 or by substituting the words "this chapter shall apply everywhere" for the present section 791. Discussion in support of this proposal follows.

"The criminal jurisdiction of the government of the United States--that is, its jurisdiction to try parties for offenses committed against its laws--may in some instances extend to its citizens everywhere. Thus, it may punish for violation of treaty stipulations by its citizens abroad, for offenses committed in foreign countries where, by treaty, jurisdiction is conceded for that purpose, as in some cases in China and in the Barbary States; it may provide for offenses committed on deserted islands, and on an uninhabited coast, by the officers and seaman of vessels sailing under its flag. It may also punish derelictions of duty by its ministers or consuls, and other representatives abroad. But in all such cases it will be found that the law of Congress indicates clearly the extraterritorial character of the act at which punishment is aimed. Except in cases like these, the criminal jurisdiction of the United States is necessarily limited to their own territory, actual or constructive. Their actual territory is co-extensive with their possessions, including a marine league from their shores into the sea."

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Courts have been led to seek the answers to two questions in determining whether they have jurisdiction where criminal offenses have occurred abroad: (1) Whether Congress has power to define and punish offenses perpetrated by a citizen of the United States outside of its territorial jurisdiction and (2) whether Congress has exercised that power by legislation. The answer to (1) above is generally "yes" in accordance with international law principles. The second question raises the question of how Congress exercises its power to define and punish offenses perpetrated by a citizen outside of this country's territorial jurisdiction.

The Bowman case was decided in 1922 and in an opinion by Chief Justice Taft it was claimed that "the necessary locus of an offense when not specially defined, depends upon the purpose of Congress, as evinced by the description and nature of the crime, and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations." The Chief Justice went on to say that criminal statutes which are as a class not dependent upon their locality for the government's jurisdiction should not be interpreted in this way. The government, he said, has the right to defend itself against fraud and obstruction wherever perpetrated especially if committed by its own citizens. Where such offenses can be committed as easily on the high seas or in foreign countries as at home, Congress allows it jurisdiction "to be inferred from the nature of the offense." This extends the doctrine as laid down in Smiley by Justice Field to the point of making it unnecessary for Congress to indicate: "Clearly the extraterritorial character of the act at which punishment is aimed."

It is necessary to consider more closely the situation involved in the Bowman case. First, it must be noted that counsel for Bowman made no appearance before the Supreme Court and apparently submitted no brief. The Solicitor General based part of his argument on the Smiley case for the proposition that the criminal jurisdiction of the United States may extend to offenses against its laws committed by American citizens upon American ships on the high seas. Second, the nature of the offense was a conspiracy and therefore if the locus of any one act done in its furtherance was within the jurisdiction of the United States, the prosecution could be brought by the United States regardless of where the final transaction took place. Finally, the statute involved was one which was amended in 1918 evidently to protect the Emergency Fleet Corporation, a United States Government corporation, from fraud of the very nature committed by Bowman. However, there was in the statute no clear language applying the statute to offenses committed on the high seas or in foreign countries.

Interpretation of the Bowman case in some later decisions of the Supreme Court and lower courts have not proved as broad, and there have been several cases in which the Bowman view has apparently been ignored and instead the Smiley doctrine has been followed. The Smiley doctrine also has been adopted by several international law text writers.

In U.S. v. Flores, 289 US 127, 155, the Bowman case is cited for the proposition "that the criminal jurisdiction of the United States is in general based on the territorial principle and criminal statutes of the United States are not by implication given an extraterritorial effect." In Sklerotes v. Florida, 313 US 69, 73, 74, decided in 1941, the Court by way of dicta stated that "a criminal statute dealing with acts that are directly injurious to the government, and are capable of perpetration without regard to particular locality, is to be construed as applicable to citizens of the United States upon the high seas or in a foreign country, though there be no express declaration to that effect" (citing Bowman). The court then went on to state that another illustration is found in the statute relating to criminal correspondence with foreign governments (18 USCA 953). Upon examination of section 953, however, it is seen that Congress recognized the problem of jurisdiction and exercised it. The first sentence of section 953 begins: "Any citizen of the United States, wherever he may be"

In the case of Kawatika v. United States, 343 US 717, 732 (1952) the Court in discussing treason stated:

The argument in its broadest reach is that treason against the United States cannot be committed abroad or in enemy territory, at least by an American with a dual nationality residing in the other country which claims him as a national. The definition of treason, however, contained in the Constitution contains no territorial limitation. 'Treason against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. . . . ' [The Congress shall have Power to declare the Punishment of Treason. . . .] A substitute proposal containing some territorial limitations was rejected by the Constitutional Convention The act of April 30, 1790, 1 Stat. 112, which was passed by the first Congress defining the crime of treason likewise contained no territorial limitations; and that legislation is contained in substantially the same form in the present statute, 18 USC (Supp IV) 2381. We must therefore reject the suggestion that an American citizen living beyond the territorial limits of the United States may not commit treason against them (citing cases).

The treason statute refers directly to jurisdiction outside of the United States: "Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned . . ." (emphasis supplied).

The case of Yenkichi Ito v. United States, 64 Fed. 2d 73 (CCA 9, 1933) followed the Smiley doctrine in reversing a conviction for bringing aliens into the United States. The decision was based on the fact that the defendant was apprehended by the Coast Guard 40 miles off the coast of the United States and that there was no appearance of intent to extend the federal jurisdiction in this crime outside the territorial limits of the United States. The statute involved (now section 1324 of title 8, U.S. Code) makes it a crime to wilfully or knowingly encourage, induce or attempt to encourage or induce the entry into the United States of aliens not lawfully entitled to enter. Under the Bowman doctrine this statute could logically be interpreted as not confined to the territorial jurisdiction of the United States. The court, however, said nothing in the statute indicated that Congress intended it to be effective outside of the recognized territorial limits of the United States. This is the sounder view.

In considering extending the jurisdiction of the espionage laws, the history of the present section 791 is pertinent. In 1917, the espionage law was amended as part of an omnibus act concerning neutrality problems. In the House version of the bill the following language was suggested: "Offenses under this Title, when committed upon the high seas or elsewhere within the admiralty and maritime jurisdiction of the United States and outside the territorial limits thereof, shall be punished by this Title" (H. R. 291, May 2, 1917, section 9). In conference this section was enlarged upon and finally passed as follows (40 Stat. 219, 1917): "The provisions of this Title shall extend to all territories, possessions and places subject to the jurisdiction of the United States whether or not contiguous thereto, and offenses under this Title when committed upon the high seas or elsewhere within the admiralty and maritime jurisdiction of the United States and outside the territorial limits thereof shall be punishable thereunder." In the Espionage Act of 1938, 52 Stat. 3, the same wording was retained. The present wording found in section 791 of title 18, USC, was adopted in 1940 when the espionage chapter was codified.

Pending before the Senate is S. 2652 an omnibus bill containing amendments to various internal security legislation. This bill was introduced by Senators Dodd and Keating following hearings by the Internal Security Subcommittee on proposed anti-subversion legislation. During the course of these hearings, Deputy Attorney General Lawrence E. Walsh appeared in support of H. R. 1992. At these same hearings, Mr. Roger Fisher of the Harvard Law School faculty recommended that instead of deleting Section 791 of title 18, U. S. Code, a phrase be added to the present language such as "and to residents and citizens of the United States throughout the world .

Although the hearings would indicate that the Subcommittee intended to incorporate the wording of H. R. 1992 into S. 2652, the bill as it now stands is silent on this jurisdictional point. Section 1 of S. 2652 deals with the subject of venue and not jurisdiction. While it is doubtful that H. R. 1992 will receive action in this short session of the Congress, it is possible that S. 2652 will be considered at which time a floor amendment along the lines of the above discussion could be offered. Since the House has acted favorably on H. R. 1992, it can be assumed that the House would give favorable consideration to an amendment to S. 2652 which would broaden the jurisdiction of the espionage law.